In the

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-30

BEN KLEIN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Ben Klein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit. Petitioner respectfully urges the Court, for the reasons particularized herein, to reverse the judgment of the Tenth Circuit summarily after issuing the writ. In the alternative, the case should be calendared for argument on the merits.

OPINION BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit, which was captioned "not for routine publication," is reprinted in Appendix A, infra, pages A-1 to A-4. The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 11, 1979.

On June 1, 1979, petitioner filed an application for extension of time in which to file a Petition for Writ of Certiorari. On June 7, 1979, Honorable Byron R. White, Circuit Justice for the Tenth Circuit, ordered that the time for filing a petition for writ of certiorari be extended to and including July 9, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the two year limitation period, required by Rule 33 of the Fed.R.Crim.P. for filing a Motion For New Trial based on the ground of newly discovered evidence, run from a final sentence pursuant to 18 USC 4208(b), now 18 USC 4205(c).

2. Where petitioner did not appeal to the Circuit Court within the ten days allowed by Federal Rules of Appellate Procedure 4(b) because the Clerk failed to notify the petitioner and respondent of the Court's order denying defendant's Motion for New Trial pursuant to Rule 49(c) Fed. R. Crim. P.; and where both parties were notified by the Clerk six and one half months later at the request of the trial judge, may the appeal be perfected either by filing Notice of Appeal within ten days after receiving actual notice of judgment from the Clerk, or in the alternative,

shall the Court vacate the judgment and enter a new judgment of which notice may be sent and from which appeal may be taken.

STATUTES AND RULES INVOLVED

The statutory provisions involved are 18 U.S.C. Section 4208(b), now 18 U.S.C. Section 4205(c). The rules involved are Rule 2, Fed. R. Crim. P., Rule 33, Fed. R. Crim. P., Rule 36, Fed.R.Crim.P., Rule 49(c), Fed.R.Crim. P., Rule 4(b), Fed. R. App.P.

STATEMENT OF THE CASE

Petitioner, Ben Klein (hereinafter referred to sometimes as "Klein"), was convicted on September 29, 1973, of five counts of income tax evasion. On October 25, 1973, he was sentenced pursuant to 18 U.S.C. Section 4208(b) now 18 U.S.C. Section 4205(c) to a maximum term pursuant to said statute for a period of five years and ordered that he be placed in custody for ninety days of observation and study and upon his return final sentence would be imposed. Klein elected to appeal said judgment and the same was affirmed in an unpublished opinion No. 73-1945 (Tenth Cir., filed February 4, 1975). The Supreme Court denied certiorari on October 6, 1975, and the mandate of the Tenth Cir. was entered on the docket of the District Court on October 21, 1975. Following Klein's commitment for observation pursuant to the above statutes enumerated on February 9, 1976, the trial court entered its final judgment assessing a $10,000 fine and placing Klein on probation. This judgment was amended to provide for continued psychiatric treatment on January 21, 1977, and entered on the court's docket on February 9, 1977.

On February 8, 1978, Klein filed a Motion for New Trial (see Appendix C) based on newly discovered evi-

dence. The government responded in March and Klein filed a memorandum brief on April 7, 1978. The Motion and other pleadings were forwarded to District Court, Judge Howard Bratton of New Mexico, who had been assigned to the earlier criminal proceedings in the United States District Court for the district of Denver, Colorado.

The government's response did not deny the allegations of Motion for new trial.

On April 10, 1978, Judge Bratton denied the Motion for New Trial. The Clerk's office in Albuquerque, New Mexico mailed a copy of the judge's order to the Clerk's office in Denver, Colorado, where the order was entered on the District Court's docket on April 12, 1978. No notice of the entry of the order was mailed to either counsel for the petitioner or respondent as provided by Fed.R.Crim.P. 49(c), nor did the parties receive notice in any other manner whatsoever.

In October 1978, inquiry about when a ruling could be expected was made at the court's office in Albuquerque. Only then was it discovered that counsel for both sides knew nothing about the order entered in April. The Clerk's office in Denver was contacted by Judge Bratton, and copies of the order were mailed to all counsel. Thus, both sides know of the ruling on or about October 23, 1978. (See trial court's memorandum opinion, Appendix D).

Thereafter, on November 2, 1978, Klein filed a Motion To Vacate the April 12th order and tendered therewith a notice of appeal which the District Court noted was untimely.

Klein then appealed Judge Bratton's decision in denying the Motion to Vacate and the Tenth Circuit affirmed on May 11, 1979 in an opinion not for routine publication No. 79-1024 (see Appendix A).

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT

1. Does the two year limitation period, required by Rule 33 of the Fed.R.Crim.P. for filing a Motion for New Trial based on the ground of newly discovered evidence, run from a final sentence pursuant to 18 U.S.C. 4208(b) now 18 U.S.C. 4205(c).

The Court of Appeals, in rendering its decision finding that the Motion for a New Trial was untimely because it was not filed within a two year period as required by Rule 33 Fed.R.Crim.P., has decided a federal question in a way in conflict with the applicable decisions of the Supreme Court of the United States and in conflict with the decision of another court of appeals on the same matter.

In *Berman v. United States,* 302 U.S. 211, 58 Sup. Ct. Reporter 164, at page 166, the court said "final judgment in a criminal case means sentence. The sentence is the judgment".

In *Corey v. United States,* 375 U.S. 169, 84 Sup. Ct. 298, (1963), at page 301, the court stated as follows: . . . "in the ordinary criminal case, where the imposition of a sentence follows promptly upon a determination of guilt, no problem arises in the application of these appellate rules" . . . "But under the provisions of 18 U.S.C. Section 4208(b) the trial judge sentences a convicted defendant not once, but twice. The judge first imposes a sentence of imprisonment "deemed to be" the maximum prescribed by the law and then, after the defendant has been imprisoned for three or six months, the judge fixes a new sentence which may be quite different from the one imposed."

At page 302 in footnote 15 the court states as follows:

"Only the final sentence which was later imposed would still have been open, under accepted procedures, to

attack in the trial court and review on appeal" . . . "If a defendant appeals after a preliminary commitment under Section 4208(b) and is enlarged on bail pending appeal, the further procedures under Section 4208(b) (including the pronouncement of final sentence) will necessarily be postponed until the appeal is determined (and eliminated entirely if the conviction is reversed), because the diagnostic study by the Bureau of Prisons cannot be carried out if the defendant is not incarcerated."

The facts of Klein and this case are nearly identical for purposes of this argument pertinent to "final judgment".

In *United States v. Behrens,* 375 U.S. 162, 84 Sup. Ct. 295, (1963), at page 296 and 297 the court said: "It is plain that as far as the sentence is concerned the original order entered under Section 4208(b) is wholly tentative. That section merely provides that commitment of a defendant to the custody of the Attorney General "shall be deemed to be for the maximum sentence," but does not make that the final sentence. The whole point of using Section 4208(b) is, in its own language, to get "more detailed information as a basis for determining the sentence to be imposed * * *." It is only after the Director of the Bureau of Prisons makes his report that the court makes its final decision as to what the sentence will be." . . . "There is no such finality of sentence at a Section 4208(b) preliminary commitment. The use of Section 4208 (b) postpones action as to the final sentence; by citing that section the court decides to await studies and reports of a defendant's background, mental and physical health, etc., to assist the judge in making up his mind as to what the final sentence shall be. It is only then that the judge's final words are spoken and the defendant's punishment is fixed."

In the case of *United States v. Morgan,* 567 F2d 479 (1977) District of Columbia Circuit at page 492 the

court said: "The Youth Corrections Act is one of several procedures now available to judges in which sentencing becomes a two-stage process. The defendant is first committed to the custody of the Attorney General for observation and study for sixty days. Then, with the benefit of the information provided by the study, the judge determines whether the defendant would benefit from youth treatment and fixes a final sentence accordingly. Similarly, under 18 U.S.C. Section 4208(b), the judge may hand down a provisional sentence and commit the defendant for a three-month study of his suitability for parole. Then, with the benefit of the study, the judge may affirm the provisional sentence, reduce it, or place the defendant on probation. Since the Federal Rules of Criminal Procedure everywhere refer merely to "sentencing," as if this were inevitably a one-stage process, applying the Rules to the statutory procedures has required considerable ingenuity."

The court, at footnote 62 at page 492 in the same opinion interprets *United States v. Behrens,* supra, under Section 4208(b) second sentencing as "sentencing" for purposes of Fed.R.Crim.P. 43 and 32(a).

Also see *United States v. Barker,* 514 F2D (1975) D.C. Circuit.

It is obvious then that final sentence in Klein's case was pronounced on February 9, 1976, after his return from study and observation pursuant to Section 4208(b).

Accordingly, the two year period during which Klein could have filed his motion for a new trial ended on February 9, 1978. His motion was timely filed on February 8, 1978.

2. Where petitioner did not appeal to the Circuit Court within the ten days allowed by Federal Rules of Appellate Procedure 4(b) because the clerk failed to notify the petitioner and respondent of the Court's order denying de-

fendant's Motion For New Trial pursuant to Rule 49(c) Fed. R. Crim.P.; and where both parties were notified by the Clerk six and one half months later at the request of the trial judge, may the appeal be perfected either by filing Notice of Appeal within ten days after receiving actual notice of judgment from the clerk, or in the alternative shall the Court vacate the judgment and enter a new judgment of which notice may be sent and from which appeal may be taken.

The Court of Appeals, in deciding that the petitioner's appeal was untimely, decided a federal question in conflict with applicable decisions of the Supreme Court of the United States and in conflict with decisions of other circuit courts of appeals on the same matter.

In October 1978, not having received any notice of court action, petitioner inquired about when a ruling could be expected, at the court's office in Albuquerque. It was then discovered that counsel for both sides knew nothing about the order entered April 10, 1978. The trial judge contacted the clerk's office in Denver and required that notice of the court's order be sent to counsel. Petitioner received the clerk's notification on or about October 23, 1978, and filed his notice of appeal within ten days. He also filed a Motion to Vacate said judgment entered on April 10, 1978. This procedure was approved in *Hill v. Hawes,* 320 U.S. 520 (1944) and *Rosenbloom v. United States,* 355 U.S. 80 (1957).

The facts of this case arise from a most unusual set of circumstances. It is significant that as a result of the court contacting the clerk's office in Denver, copies of the order were then mailed by the clerk at the request of the court, the Court thus requiring compliance with the notice provision of Rule 49(c) Fed.R.Crim.P. Nothing more could have been done by petitioner to perfect his appeal after he timely filed his Notice of Appeal.

The facts in this case are distinguishable from *United States v. Robinson,* 361 U.S. 220, 80 Sup. Ct. 282, 4 L.Ed., 2d 259, (1960). In that case all the parties had notice of the judgment of conviction and it was a misunderstanding as to whether the notice of appeal was to be filed by the defendants or their counsel. In *Hill v. Hawes* supra, the clerk did not mail entry of judgment as required by the rule. The district court vacated and reentered that judgment in order that an appeal could be taken. The Supreme Court of the United States noted that it could "think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given". Id. 523. The court went on to hold that it was within the competence of the district court to take such action with regard to its judgments as justice required — in the case then at bar, this amounted to vacating and reentering the judgment so that the timely appeal could be taken. (See also *Carter v. United States,* 168 F2d 310 (Tenth Cir. 1948), in which the court recognized that the Hill case was equally applicable to criminal cases where the order from which appeal is sought is one denying post conviction relief. (See also *Rosenbloom v. United States supra*), granting a criminal defendant his right of appeal after the clerk failed to mail the notice.

It is noteworthy under Rule 49(c), Fed.R.Crim.P., (See Appendix B, pages B-2 and B-3) that the advisory committee regards the failure of the clerk to notify the parties of the court's action as suspending the natural effect of the Rule's requirement that notice of appeal be filed in ten days. The committee states:

> "This rule is an adaptation for criminal proceedings of Rule 77(d) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. No consequence

attaches to the failure of the clerk to give the prescribed notice, but in a case in which the losing party in reliance on the clerk's obligation to send a notice failed to file a timely notice of appeal, it was held competent for the trial judge, in the exercise of sound discretion, to vacate the judgment because of the clerk's failure to give notice and to enter a new judgment, the term of court not having expired. *Hill v. Hawes,* 64 S. Ct. 334, 320 U.S. 520, 88 L.Ed. 283, rehearing denied 64 S. Ct. 515, 321 U.S. 801, 88 L. Ed 1088."

The petitioner urges that the Committee be taken at their word and that the time for appeal begin to run in the case where no notice whatever was sent, only when notice was in fact received.

Rule 36. Fed.R.Crim.P. Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

In *Schact v. United States,* 90 S.Ct. 1555, 26 L.Ed. 2d 44, Petition for Certiorari was granted even though filed more than one hundred and one days after the appropriate period for filing the petition had expired. (See also *Fallen v. United States* 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed. 2d 760 (1964).

In *Browder v. Director Department of Corrections of Illinois,* 98 S.Ct. 556 (1978) Mr. Justice Blackmun with whom Mr. Justice Rehnquist concurred, suggested a vacation of the judgment with a new judgment entered, then respondent's notice of appeal would have been timely.

The following cases suggest that where no notice is given to the parties under these circumstances the trial court may vacate and reenter a judgment. *Buckeye Cellulose Corporation v. Braggs Electric Construction,* 569 F2d 1036, Eighth Cir. (1978); *Fidelity and Deposit Company of Maryland v. Usaform Hail Pool, Inc.* 523 F2d 744, Fifth Cir. (1975); *Walter C. Lohman, Jr. v. United States,* 238 F2d 645, Sixth Cir. (1956); *Expeditions Unlimited Aquatic Enterprises Inc. v. Smithsonian Institute,* 500 F2d 808 District Court Cir. (1974); *Smith v. Jackson Tool and Die, Inc.* 426 F2d 5 Fifth Cir. (1970).

These cases all indicate that a trial court may vacate and reenter a judgment to allow a timely appeal when neither party has actual notice of the entry of judgment, when the winning party is not prejudiced by the appeal and when the losing party moves to vacate the judgment within a reasonable time after he learns of its entry.

CONCLUSION

The petitioner believes that under the cases set forth herein and for the reasons stated it is respectfully requested that this court grant a Writ of Certiorari and reverse the judgment of the Tenth Circuit summarily, or in the alternative, calendar the case for argument on the merits.

Respectfully submitted,

Ben Klein
1738 Pearl Street
Denver, Colorado 80203
pro se

July 2, 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BEN KLEIN,
Defendant-Appellant.

NO. 79-1024

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(CIV. NO. 73-CR-113)**

Robert E. Barker and John F. Quinn filed a memorandum on behalf of appellant.

Joseph F. Dolan, United States Attorney, Richard N. Stuckey, Assistant United States Attorney, filed a memorandum on behalf of appellee.

Before SETH, Chief Judge, PICKETT, and McWILLIAMS, Circuit Judges.

PER CURIAM

Appellant Ben Klein seeks review of the district court's November 30, 1978 order denying his motion to vacate an April 12 order of that court. The district court concluded that in spite of the circumstances, it was without jurisdiction to vacate the earlier order denying appellant's motion for a new trial under Fed.R.Crim.P. 33. We agree.

Appellant was convicted of five counts of income tax evasion in 1973. On direct appeal to this court, the conviction was affirmed. United States v. Klein, Unpublished No. 73-1945 (10th Cir. filed February 4, 1975). The Supreme Court denied certiorari on October 6, 1975, and the mandate of this court was entered on the docket of the district court on October 21, 1975.

Following Klein's commitment for observation pursuant to 18 U.S.C. § 4208(b), now 18 U.S.C. § 4205(c), judgment of fines and probation was entered in 1976. This judgment was amended to provide for continued psychiatric treatment in January of 1977.

In February of 1978, appellant filed a motion for new trial based on newly discovered evidence. The government responded in March and appellant filed a memorandum brief on April 7, 1978. The motion and other pleadings were forwarded to District Court Judge Bratton of New Mexico, who had been assigned to the earlier criminal proceedings in the United States District Court for the District of Colorado.

On April 10, 1978, Judge Bratton denied the motion for new trial on the grounds that the motion was untimely filed under Fed.R.Crim.P. 33 and that the alleged newly discovered evidence was not in fact evidence. The clerk's office in Albuquerque, New Mexico, mailed a copy of the judge's order to the clerk's office in Denver, Colorado, where the order was entered on the district court's docket on April 12, 1978. No notice of the entry of the order was mailed to counsel, as provided by Fed.R.Crim.P. 49(c).

Counsel for appellant did not discover the entry of the April 12 order until October of 1978, following an inquiry to the clerk's office in Albuquerque as to when a ruling on the motion might be expected. Thereafter, on

November 2, 1978, counsel filed a motion to vacate the April 12 order and tendered therewith a notice of appeal, which the district court noted was untimely.

In denying the motion to vacate, the district court held, based primarily on United States v. Robinson, 361 U.S. 220 (1960), that it was without power to vacate its April 12 order, since the motion to vacate was in reality a motion for an enlargement of time to file a notice of appeal under Fed.R.App.P. 4(b) and that the time for filing such motion had run. We affirm this ruling.

It is of course regrettable that neither of appellant's counsel was informed by the clerk of the April 12 order. However, it has long been held that, standing alone, lack of such notice does not excuse the untimely filing of a notice of appeal. Gooch v. Skelly Oil Company, 493 F.2d 366 (10th Cir. 1974); Buckley v. United States, 382 F.2d 611 (10th Cir. 1967), *cert denied,* 390 U.S. 997 (1968); Lathrop v. Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir.), *cert. denied,* 404 U.S. 840 (1971).

The case of United States v. Fallen, 378 U.S. (1964), cited by appellant, is not to the contrary. In *Fallen,* the Supreme Court concluded that the prisoner appellant, who was *pro se,* incarcerated, and hospitalized had done all within his power to perfect his appeal and in the interests of justice should not be penalized for the untimely notice of appeal. Here, on the other hand, we have an appellant represented by attorneys in both Denver and Santa Fe, and who was an attorney himself. It is incumbent upon a prospective appellant to keep himself apprised as to the status of his case. Gooch v. Skelly Oil Company, *supra.* The district court was correct in holding that although the circumstances might have established excusable neglect under Fed.R. App.P. 4(b), such a finding cannot establish jurisdiction if none exists.

The district court was correct in its finding that the motion for a new trial was untimely. The concurring opinion in Smith v. United States, 283 F.2d 607 (D.C. Cir. 1960), *cert. denied,* 370 U.S. 950 (1962) sets forth the test of when the two-year period begins (i.e., the date of final judgment) as the last date for taking an appeal if no appeal is taken, and if an appeal is taken, then the date when the appellate process is terminated. Smith v. United States, *supra,* 283 F.2d at 610. Thus, a motion for new trial based on newly discovered evidence may only be made before or within two years after issuance of the mandate of affirmance by the appellate court. United States v. Granza, 427 F.2d 184, 185, n.3 (5th Cir. 1970). *See also* United States v. White, 557 F.2d 1249 (8th Cir. 1977); Casias v. United States, 337 F.2d 354 (10th Cir. 1964); United States v. Mallah, 427 F.Supp. 328 (S.D.N.Y.), *aff'd.,* 559 F.2d 1205 (2nd Cir. 1977) (construing mandate date as appellate court's affirmance of conviction, not Supreme Court's denial of certiorari, but also discussing merits).

In the case at bar this court affirmed the conviction on February 4, 1975. Certiorari was denied by the Supreme Court on October 6, and the mandate from this court was entered on the district court's docket sheet on October 21, 1975. Thus the time for filing a motion for new trial had run no later than October 21, 1977. Fed.R.Crim.P. 33. The motion in this case was filed February 8, 1978. The time for filing a Rule 33 motion cannot be enlarged. Fed.R.Crim.P. 45(b).

Accordingly, the order of the district court denying the motion to vacate is affirmed. The mandate shall issue forthwith.

APPENDIX B

18 U.S.C., Section 4208(b)

1. 18 U.S.C. § 4208(b) provides:

"If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maixmum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section."

Text of Rule 2 — Fed.R.Crim.P.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

RULE 36. Clerical Mistakes. Fed.R.Crim.P.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

RULE 49. Service and Filing of Papers. Fed.R.Crim.P.

(a) Service: **When Required.** Written motions other than those which are heard *ex parte*, written notices, designations of record on appeal and similar papers shall be served upon each of the parties.

(b) Service: **How Made.** Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(d) of the Federal Rules of Appellate Procedure.

(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions. As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.

Note to Subdivision (c). This rule is an adaptation for criminal proceedings of rule 77(d) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. No consequence attaches to the failure of the clerk to give the prescribed notice, but in a case in which the losing party in reliance on the clerk's obligation to send a notice failed to file a timely notice of appeal, it was held competent for the trial judge, in the exercise of sound discretion, to vacate the judgment because of clerk's failure to give notice and to

enter a new judgment, the term of court not having expired. Mill v. Hawes, 64 S.Ct. 334, 320 U.S. 520, 88 L.Ed. 283, rehearing denied 64 S.Ct. 513, 321 U.S. 801, 88 L.Ed. 1088.

RULE 4(b) Appeals in Criminal Case, Rules of App. Proc.

(b) **Appeals in Criminal Cases.** In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discivered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

NO. 73-CR-113

UNITED STATES OF AMERICA, Plaintiff, vs. BEN KLEIN, Defendant.	MOTION FOR NEW TRIAL NEWLY DISCOVERED EVIDENCE EVIDENTIARY HEARING REQUIRED

The defendant, by his attorneys, respectfully moves the court to set aside the judgment and sentence herein, and to grant him a new trial on the charges in the indictment, on the grounds that he has obtained newly discovered exculpatory evidence as follows:

A. In the years preceding the tax investigation leading to the instant indictment, the defendant was under investigation by the Bureau of Narcotics and Dangerous Drugs (BNDD) for allegedly financing, on a "loan shark" basis, a certain heroin trafficking operation.

B. Apparently unable to prove the substance of allegations of drug trafficking activity, BNDD referred the defendant to the Internal Revenue Service (IRS) recommending that he be a target for a tax evasion investigation.

C. Throughout the IRS investigation no evidence was found connecting the defendant to loan sharking in narcotics trafficking.

D. Yet as late as after the trial in this matter, the United States Attorney for the District of Colorado persisted in believing the defendant to be guilty of the above mentioned loan sharking activity and believed the tax evasion prosecution to be substantiated by the increases in net worth obtained thereby.

E. The Government's belief in defendant's guilt of loan sharking in narcotics trafficking was communicated, prior to trial, to the expert witnesses who testified on behalf of the United States to defendant's competency and sanity.

F. The government not only possessed exculpatory evidence and excluded defendant's access to it, but they used such evidence wrongfully in communicating it to their psychiatric experts who then communicated their opinions to the court and jury.

(To support allegations A-C, above, defendant attaches to this motion, which attachment is incorporated herein by this deference, Exhibits A-1 through A-15 selected pages of BNDD and IRS files on defendant obtained pursuant to Freedom of Information Act requests, which requests were not fully answered. To support allegations D and E, above, defendant attaches to this motion, which attachments are incorporated herein by this reference, Exhibits B and C, affidavits of Corrine Cottrell and Dr. John Yost.)

In support of this motion defendant states:

1. The above new evidence was discovered after the trial, quite by the accident of inadvertent placement in defendant's civil tax file and of casual mention in conversation. See affidavit of Robert Barker attached hereto as Exhibit D.

2. The above evidence could not have been discovered by due diligence as it was in the exclusive control of the government. Moreover, upon defense requests which could have revealed this information the government's attorneys and the expert witnesses chose to evade rather than divulge this information. See Tr. 32, 2148, attached to this motion as Exhibit E. Mr. Madden apparently chose to withhold anything from the defense except what was specifically requested. Dr. Miller, likewise, apparently required very specific defense requests pertaining to information supplied to him by Dr. Madden.

3. The new evidence is material, is not merely cumulative or impeaching and would produce an acquittal upon a retrial. The materiality is specifically related to three areas.

a. First, the opinions of the government's expert psychiatric witnesses. These opinions, being based in part on hearsay and alleged facts which are untrue, are incompetent. Additionally, had the government's experts not have been informed of the alleged loan sharking in narcotics trafficking, their opinions on defendant's competency and sanity would have been different. Exhibit F-Pg. 30 through 33 Tr. Incl. Dr. Miller apparently had unusually broad access to the merits of the case by private conversations with the prosecution. The new evidence would accordingly result in an acquittal by reason of the main thrust of defendant's defense, insanity.

Dr. Frederick Miller states that he considered everything available to him when he gave his opinion of Klein's competency and sanity. Exhibit G-Tr. 20. This means that he also considered that Klein was a narcotic traffiker and thus his opinion with its undisclosed basis went to the Court on the issue of competency and to the jury on the question of defendant's capacity to commit any crime.

The probability that the secret knowledge of Klein's alleged drug trafficking swayed the opinion of those examining him is obvious. If Klein were "competent" and "sane" enough to commit the crime implicit in narcotics trafficking, then he was obviously faking his insanity defense.

b. Second, the respective credibility of the government's case and of defendant's explanation of unreported increases in net worth as being due to good faith errors and non-taxable gifts from his father. The new evidence shows that the government believed that the "likely source" from which increases in net worth sprang was illegal activity in narcotics trafficking; it also shows that this was not at all a source. The new evidence would thus cast serious doubt on all aspects of the government's case while at the same time greatly tend to support defendant's explanations. The new evidence would accordingly result in an acquittal upon retrial.

c. Third, selective prosecution. Before the discovery of the new evidence, this defense was not available. Now it appears that the government singled out and targetted its victim only to build its case afterwards. When a prosecution is motivated by a bad or impermissible reason, it may not, consistently with the Constitution, be brought to the culmination of a conviction. Thus, the new evidence would certainly have brought about a result opposite to that of defendant's conviction.

4. The United States Federal Medical Center for Federal Prisoners evaluated Ben Klein and found him to be severely and chronically mentally ill and this evaluation clearly supports Klein's insanity defense at the trial. Exhibit H, Affidavit of Robert E. Barker. Those evaluating Klein for the court pursuant to its order under U.S.C. 4028(B) were unhindered by any allegation that he was a loan shark

for narcotics traffickers. This was not the case with respect to the psychiatrists and psychologists who evaluated Klein for both competency and criminal responsibility and whose opinions were heard by the court and jury. These people had access to untrue hearsay accusations that Klein was engaged in drug trafficking.

We request the court take judicial notice of the report to this court of the evaluation at Springfield Federal Medical Center requested by this court under U.S.C. 4208(B).

5. Fundamental Fifth Amendment Due Process and the proscriptions of the Fourth Amendment to the United States Constitution require that a new trial be had to afford Klein an opportunity to protect himself from the use of evidence that might be otherwise inadmissable. Justice requires that Klein be allowed to scrutinize the source of the prosecution's evidence to determine whether it was obtained legally or from a reliable informant. *Black vs. United States,* 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed. 2d 26 (1966).

6. A brief in support of this motion is filed herewith and is incorporated herein by this reference.

Wherefore, defendant respectfully requests the following relief:

1. That the court grant defendant a new trial on the basis of this motion and attachments; or alternatively,

2. That the court allow an evidentiary hearing and oral argument on this motion and prior thereto:

a. That the court order the United States Attorney to provide the defendant within 30 days with complete documents and information relating to the investigation of the defendant by any agency or person whatsoever and a list of all government witnesses who were advised in any fashion that defendant was suspected of being involved in loan sharking or narcotics trafficking; and all psychiatric reports purusant to this court's order under U.S.C. 4208(B).

b. That the court allow the defendant thirty days after the receipt of such information to amend his motion for a new trial.

Respectfully submitted,

JOHN F. QUINN

John F. Quinn
P.O. Box 2843
Santa Fe, New Mexico 87501

ROBERT E. BARKER

Robert E. Barker
1738 Pearl Street
Denver, Colorado 80203
Telephone No. 861-7171
Reg. No. 004980

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing motion was deposited in the United States mail, postage prepaid this 8th day of February, 1978, addressed as follows:

U.S. District Attorney
Joe Dolan
District of Colorado
U.S. Court House
C 330 U.S. Court House
Draw No. 3615
Denver, Colorado 80294

to: Regional Commissioner, Southwest Region
Attention: ARC — Intelligence

from: Director, Intelligence Division CP:I:O
Washington, D.C.

subject: Drug Traffickers Project

Involving:
Ben Klein
Denver, Colorado

In accord with an agreement reached between the Department of Justice, the Bureau of Narcotics and Dangerous Drugs and this Service, the above named subjects have been reported to us as being involved at significant levels in primary drug distribution systems.

Attached is a memorandum dated May 6, 1971, received from Mr. Andrew C. Tartaglino, Assistant Director, for Enforcement, BNDD, who has advised that extensive files on these subjects are available in their Regional Office for review.

It is requested that preliminary investigation of their income tax returns be initiated at the earliest possible date. Such preliminary investigations should include among other things, contact with field office of BNDD, Customs Service Agency, local police, particularly the Narcotics Division, a check of public records, etc.

Following those preliminary steps, an evaluation should be made to determine if the information developed justifies a full scale joint investigation. Should further investigation be deemed unwarranted, such reasons should be detailed in the closing report.

This Project is considered to be an important area of enforcement activity. Since we have been asked to keep the Secretary of Treasury as well as the Commissioner advised of our progress on these selected cases, separate status reports on each individual are required every two months. The first report should be submitted so as to reach this office no later than August 1, 1971, marked for the attention of: CP:I:O (K.L.W.).

Should there be any questions regarding these investigations, please call Senior Coordinator Kenneth L. Wilson, (202-964-6411), who is coordinating this Project.

R. K. LUND
Director

Attachment

PHOTO UNAVAILABLE

NAME: Ben Klein

ALIASES: none

ETHNIC ORIGIN: American citizen

DESCRIPTION: Date of Birth: unknown Place of Birth: unknown

Height: unknown Weight: unknown

Hair: unknown Eyes: unknown Build: unknown

ADDRESS: 481 South Perry, Denver, CO

TELEPHONE NO.: unknown DRIVERS LICENSE NO. unknown

LOCALITIES FREQUENTED: Denver, CO

FAMILY BACKGROUND: Mother: unknown

Father: unknown

Address of Parents: unknown

Siblings: unknown

In-laws: unknown

Wife: unknown Date of Marriage: unknown

CRIMINAL ACTIVITIES: Loan shark, and finances heroin operation of

CRIMINAL ASSOCIATES:

CRIMINAL HISTORY: unknown

ARRESTS: unknown

LEGAL BUSINESS: State Senator and practicing attorney

SOURCE OF SUPPLY:

SYSTEM: CASE FILE NO:

REMARKS:

Identification of Colorado Segment of
Major Illegal Drug System Page 2 of 2

a seven year sentence. On May 22, 1967, he was paroled and on February 19, 1970, released from supervision. Denver Police Department No. is and his FBI No. is

according to SN-10-0015, also pools his finances with toward the purchase of heroin. at one time was a practicing attorney in but was disbarred after being convicted for receiving stolen property. formerly ran the and reportedly had several known heroin dealers working for him as "strong arm collectors". is currently employed as a Information furnished by SN-10-0015 reveals that furnishes a "front" for persons involved with him in the illegal sale of heroin. This is done by having these persons work for the , however, according to SN-10-0015, these people sign their checks over to as payment for the job.

Ben KLEIN — SN-10-0015 states that KLEIN furnishes money to finance the aforementioned individuals heroin operation. This usually is done on a "loan-shark" basis. The money is furnished with full knowledge on KLEIN'S part as to what the money is being used for. SN-10-0015 states that he has seen KLEIN present during deliveries of heroin by and that KLEIN often stayed until the heroin had been "cut" and divided among the individuals purchasing it. KLEIN is currently a state representative and practicing attorney in Denver, Colorado.

5. Plans for the immobilization of this segment of the system are to make purchases of heroin from all of the above-mentioned subjects with the exception of KLEIN. SN-10-0015 advises that he has never known KLEIN to personally handle any heroin but feels that a conspiracy case can be developed against KLEIN because of his association with the other subjects involved.

"This document originated from the U.S. Probation Office in Denver, Colorado. We have deleted reference to individuals therein because of possible violations of the Privacy Act by their appearance in a public document."

Robert E. Barker
John F. Quinn

EXHIBIT A-3

REPORT OF INVESTIGATION — PAGE 1 OF 1

FILE TITLE | IDENTIFIER | FILE NUMBER

PROGRAM CODE

☐ ACTIVE ☐ CLOSED ☐ REQUESTED ACTION COMPLETED | OTHER OFFICERS | CROSS FILE | RELATED FILES

☐ ACTION REQUESTED FROM:

Phoenix, Arizona

DATE: November 16, 1970

REPORT RE:

Request for updating information regarding Colorado Segment

1. In accordance with Bureau Order 0-59 which requires updated intelligence information of secondary targets. It is requested that the Denver Regional Office submit profile sheets and updated information regarding the following individuals by November 30, 1970.

b. Ben KLEIN, State Representative and practicing attorney in Denver, Colorado.

(For above names, see BND-6 dated September 11, 1970 by Special Agent and BND-6 dated August 12, 1970 by Special Agent)

REGION

DISTRICT: Reg. 12 (Denver)

OTHER

OFFICIAL USE ONLY
Bureau of Narcotics and Dangerous Drugs
Department of Justice

This report is the property of the Bureau of Narcotics and Dangerous Drugs.

EXHIBIT A-4

December 11, 1970

Regional Director
Denver Regional Office

Criminal Investigations Division

Reference is made to the telephone conversation this date, between and Assistant Regional Director regarding the up-dating of

The following named individuals have been approved by ENFC for this system:

16. Ben Klein

EXHIBIT A-5

January 19, 1971

Regional Director
Denver Regional Office
, Chief
Criminal Investigations Division

Additions

Reference is made to BND-6 dated December 30, 1970, by
Special in case file:

Listed below are the subjects now approved by ENFC for this system:

16. Ben KLEIN

EXHIBIT A-6

REPORT OF INVESTIGATION
(Continuation)

DATE
April 19, 1971

13. Ben KLEIN: Previously reported and mentioned in BNDD indices.

EXHIBIT A-7

6 May 1971

Senior Coordinator (C.P.;I;O)
Internal Revenue Service

Assistant Director for Enforcements
Bureau of Narcotics and Dangerous

Tax Evasion Investigations

The following individuals are recommended as appropriate targets for tax evasion investigations:

Ben KLEIN
Denver, Colorado
(

)

Please note that the file references in parentheses are for reference within our BNDD administrative system.

Regional Director of our Denver Regional Office (1950 Stout Street, U.S. Customs House, Denver, Colorado, 80202, telephone number, 303-297-4291) may be contacted for detailed information.

EXHIBIT A-8

1. NAME AND ADDRESS (No., Street, City, Cty, & State)
KLEIN, BEN
597 Zenobia Street
Denver County
Denver, Colorado

2. ZIP CODE
80219

3. CASE NUMBER
84 14 079 47
Southwest Reg.-
Denver Dist.

4. I.D. NUMBER

5. SOC. SEC. NO. 21-32-8160
6. E.I. NO. 84-0458316
7. OCCUPATION Lawyer and State Senator

8. DATE OF BIRTH 1-5-26
9. PLACE OF BIRTH Denver, Colorado
10. SOURCE OF CASE (Place "X" in appropriate bk.) Audit (1) Coll (2) DP (3) SA (4) Govt (5) X Pub (6) TCR (7) WO (8)

11. ALIASES, DBA'S, PARTNERSHIPS AND OTHER CROSS-REFERENCES
12. CRIMINAL SECTIONS OF LAW 7201-IRC

13. RELATED CASES Iowa
14. METHOD OF COMPUTATION Net worth — expenditures
15. TAXES PER ORIGINAL RETURNS $40,491.70
16. TAX PERIODS INVOLVED 1962-1970

17. RECEIVED (Date) 6-3-71
18. NUMBERED (Date) 6-10-71
19. FULL-SCALE (Date) 7-29-71
20. NO. TAX PERIODS (Civil) 9
21. DEFICIENCIES AND PENALTIES $177,743.80

22. REGIONAL ?????? APPROVED
23. U.S. ATTORNEY INDICTED
24. PROSECUTION APPROVED BY INTELLIGENCE (Date) Sep. 15 1972
25. LEVEL CLOSED W/D (1) N/P (2) RC (4) DJ (5) USA (6) Court (7)
26. DATE CLOSED

27. DEPT. OF JUSTICE APPROVED
28. CONVICTED
29. FORWARDED TO ☐ Regional Counsel ☐ U.S. Attorney
30. REASON CLOSED

31. SUMMARY OF CASE

This case was referred from the Bureau of Narcotics and Dangerous Drugs with the general allegation that the taxpayer was involved in financing of persons engaged in narcotics traffic. The investigation and income determination was made by the net worth expenditures method.

Interest income from bank accounts per his returns indicated net worth increases in excess of reported incomes. The taxpayer retained counsel the same afternoon he was advised of the investigation. Initially, cooperation was limited in the production of bank statements, deposit slips and cancelled checks.

The net worth determination of income was substantially completed by May 1972. When the taxpayer's counsel was advised the investigation disclosed net worth increases inconsistent with reported income, he offered to have the taxpayer testify on the limited subject of "cash transactions with his father" provided he was furnished the tentative net worth computations. This was done on

June 2, 1972, and KLEIN testified that he received cash gifts from his father starting in 1966 and continuing into 1972, amounting to about $85,000 with $50,000 to $55,000 of this amount being received during the years 1966 to 1970, inclusive.

(SEE OVER)

32. REMARKS		35. MONTHS TO SERVE		
		Imprisoned	Sus. & Conc.	Probation
		36. FINES		
		To Pay $		Suspended $
33. AGENT SUBMITTING CASE	34. GROUP SUPERVISOR	37. JUDGE'S NAME		38. JUDICIAL DISTRICT
PAUL W. GRIMES	R. L. HILL			

Form **7691-A** (Rev. 7-71)

Dispose of all prior issues

CASE SUMMARY — Report Symbol No-CP: 1-18

Department of the Treasury
Internal Revenue Service

EXHIBIT A-9

Details regarding allegations and other remarks

Preliminary investigation was initiated upon receipt of information from Bureau of Narcotics and Dangerous Drugs indicating that taxpayer was involved in drug traffic.

Taxpayer has been a member of Colorado Legislature since 1954.

Taxpayer reports interest income from commercial and savings banks indicating investments of about $100,000. Reported income from law practice and salaries does not appear large enough to account for apparent net worth accumulation in bank accounts and real estate.

EXHIBIT A-10

February 15, 1972

to: Group Supervisor A:F:6

from: G. M. Smith IRA

subject: 1969 and prior year return on hand 2/16/72.

Case: Ben Klein

Date Opened: 9/16/71

Designation: Target Case — Drug Trafficker — IRS Narcotics Project

Activity: — Attorney

— Representative Colorado State Legislature

— Investments

1. Securities
2. Real Estate
3. Savings Accounts

Years involved: 6912 and 7012.

Total accumulated time: 325 hours

Estimated closing date: 7/15/72

Work to be done: Estimate net worth computation 50 to 60 per cent complete.

Have numerous third party interviews to complete for additional information and documentation.

1. Employees
   a). determine whether pay was for campaigning for office or as required for law practice.
2. Accountants
3. Clients
   a). those showing payment of substantial fees to taxpayer in peculiar ways.
4. Security brokers
   a). Purchase and sale of stocks.

5. Banks
   a). Taxpayer's returns show substantial growth in savings by increase in interest reported received from twenty different banks and savings/loan associations.
   b). Have to determine source of funds used to purchase approximately 100 cashiers checks.
6. Corporation employees.
   a). Verify and substantiate taxpayers stock ownership in corporation per corporate records and status of loans made by taxpayer to corporation.
7. Partnership records
   a). To verify and substantiate taxpayers investment in partnership and income derived from same.
8. City and County tax records.
   a). Taxpayer was involved with another party in purchasing tax certificates over a period of years. Records of same have not been made available by taxpayer or the other party therefore, income from same must be determined from City and County Tax Department records.
9. Automobile dealers.
   a). Substantiate purchase of autos. Indications present show that taxpayer purchased autos for himself and others.
10. Insurance Companies.
    a). Determine and substantiate insurance payments to be either business or personal ex-expense.
11. Taxpayer's father — Sam Klein.
    a). To determine his interest in some of the taxpayer's real estate holdings.
    b). To determine if gifts of cash were made by Sam to Ben.

c). To question if he has filed returns since 1964.

i. Indications are that he had substantial rental income and our records do not show that returns have been filed since 1964.

Net worth method of computing taxpayer's income is necessitated by the fact that taxpayer and his attorney (Les Wald) have not provided records by which a reasonable determination of income and expense may be made.

To this date, no information or evidence has been found to confirm allegations connecting this taxpayer to loan sharking in narcotics trafficking.

G. M. SMITH

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, vs. BEN KLEIN, Defendant.	CRIMINAL NO. 73-CR-113

MEMORANDUM OPINION

Before the Court for consideration is the Motion of the defendant Ben Klein to vacate the Court's Order of April 12, 1978, and to re-enter it as of this date. That order denied the defendant's motion for a new trial upon the basis of newly discovered evidence.

The present motion arises from a most unusual set of circumstances. The original criminal trial was tried by this Court upon assignment to the United States District Court for the District of Colorado, and the motion for a new trial was handled by the Court in New Mexico upon written motions mailed to Albuquerque. The Court mailed its order denying the motion to the Clerk's Office in Denver, where it was filed on April 12. No notice of the entry of the order was sent to defense counsel or to the United States attorney.

In October, inquiry about when a ruling could be expected was made at the Court's office in Albuquerque. Only then was it discovered that counsel for both sides knew nothing of the order entered in April. The Clerk's office in Denver was contacted, and copies of the order were mailed to conusel. Thus, both sides knew of the ruling on about October 23, 1978.

The defendant claims that he failed to file a timely appeal, because he relied upon the Clerk's obligation under

Fed. R. Crim. P. 49(c) to send notice of the entry of the order. As was approved in *Hill v. Hawes,* 320 U.S. 520 (1944), he asks the Court to vacate the previous order and enter a new one from which he can take a timely appeal.

The United States opposes defendant's motion on the ground that the Court lacks jurisdiction to do so as is asked, since the motion is in reality a motion for an enlargement of time to file notice of appeal pursuant to *F. R. A. P. 4(b).* For the reasons set forth below, it is reluctantly concluded that defendant's motion must be denied.

Rule 49(c), relied on by the defendant Klein provides that failure of the Clerk to give notice of the entry of an order (such as the order of April 12) does not authorize the Court to relieve a party for failure to appeal within the time allowed, except as provided by *F. R. A. P. 4(b).* Rule 4(b) in turn allows a 30-day extension beyond the original 10-day period for appeal upon a showing of excusable neglect. The interaction of these two rules precludes a grant of the relief sought by the defendant, for his motion seeks in essence an extension of time to appeal and is requested well beyond the 40-day time limit. It is not sufficient that the circumstances involved herein clearly establish a showing of excusable neglect. *United States v. Robinson,* 361 U.S. 220 (1960), states that the Federal Rules of Criminal Procedure prescribe precise times within which the power of the courts must be confined.[1] *Robinson,* in dealing with *Fed. R. Crim. P. 37 (a) 2, which is now F. R. A. P. 4(b),* held that an untimely attempt to appeal under that rule, even where excusable neglect had been found, was not permissible. Since the present motion is in reality merely an attempt to circumvent the time requirements imposed by

[1]See *Gooch v. Skelly Oil Co.,* 493 F.2d 366 (10th Cir. 1974); *Buckley v. United States,* 382 F.2d 611 (10th Cir. 1967).

Rule 4(b), the decision in *Robinson,* rather than that in *Hill v. Hawes,* 320 U.S. 520, is controlling.

At least one commentator has urged different treatment in the unusal case where no notice whatever of the entry of an order is received.[2] This argument is premised upon the Advisory Committee's Note accompanying the 1966 amendment to *Fed. R. Crim. P. 49(c),* in which it is state that Rule 49(c) will cover "most cases" where the Clerk has failed to give the defendant notice of the entry of an order. It is urged that the Committee be taken at its word and that the time for appeal begin to run in the case where *no* notice whatever was sent only when notice is in fact received.[3] This was in essence the holding in *Rosenbloom v. United States,* 355 U.S. 80 (1957), and is in reliance upon that holding that a less rigorous application of Rule 49(c) is urged.[4]

There is much to commend this position, especially in a case such as the present one. However, *Robinson* states that greater flexibility with respect to the time for the taking of an appeal is a policy question that should not be resolved by judicial decision, 361 U.S. at 229; and the Court is bound to reject Professor Moore's argument and conclude that it cannot act beyond the time limit imposed by *F. R. A. P. 4(b).*

Accordingly, an Order denying defendant Klein's motion to vacate will be entered herein, together with this Memorandum Opinion.

UNITED STATES DISTRICT JUDGE

[2]Moore's Federal Practice ¶¶ 204.4, 204.16.

[3]*Id.* at A 204.4.

[4]*Ibid.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, vs. BEN KLEIN, Defendant.	CRIMINAL NO. 73-CR-113

ORDER

The Motion of defendant Ben Klein to vacate the Order of April 12, 1978, and re-enter it as of this date having come before the Court and the Court having filed herein its Memorandum Opinion setting forth its reasons for denying the Motion; Now. Therefore,

IT IS BY THE COURT ORDERED that the Motion of the defendant Ben Klein to vacate the Order of April 12 denying his motion for a new trial and to re-enter the Order as of this date be, and it hereby is, denied.

UNITED STATES DISTRICT JUDGE

No. 79-30

In the Supreme Court of the United States

OCTOBER TERM, 1978

BEN KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-30

BEN KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this criminal tax case, petitioner seeks review of the decision below holding that his motion for a new trial and his notice of appeal from the district court's denial of the motion were untimely.

The pertinent facts are undisputed and may be summarized as follows: After a trial to a jury in October 1973, in the United States District Court for the District of Colorado, petitioner was convicted of income tax evasion in violation of 26 U.S.C. 7201. The court of appeals affirmed (35 A.F.T.R.2d 75-1284), and this Court denied certiorari (423 U.S. 827 (1975)). On October 21, 1975, the court of appeals' mandate was entered on the docket of the district court (Pet. App. A-2; Pet. 3).

In February 1978, petitioner filed a motion under Rule 33, Fed. R. Crim. P., to set aside the judgment and for a new trial based on newly discovered evidence. The district court denied the motion on April 12, 1978, on the ground that it was untimely because Rule 33 requires that such a motion must be filed "within two years after final judgment," and on the further ground that the alleged newly discovered evidence was not in fact evidence. However, no notice of the entry of the order was mailed to counsel as provided by Rule 49(c), Fed. R. Crim. P. (Pet. App. A-2). Counsel for petitioner did not discover the entry of the April 12 order until October 1978, following an inquiry to the district court clerk's office. Thereafter, on November 2, 1978, petitioner filed a motion to vacate the April 12 order together with a notice of appeal from the district court's denial of the first motion. The district court denied petitioner's motion on the ground that it was without power to vacate its April 12 order (Pet. App. A-2 to A-3).

The court of appeals affirmed (Pet. App. A-4). It held that petitioner's motion for a new trial was untimely and that the district court correctly held that it had no jurisdiction to enlarge the time within which a notice of appeal could be filed (Pet. App. A-3).

1. The decision below correctly held that petitioner's motion for a new trial was untimely.[1] Rule 33 of the Federal Rules of Criminal Procedure provides that a motion for a new trial based on newly discovered evidence must be made within two years of the entry of final judgment. The date of a final judgment is the last date for

[1]The district court also correctly held that evidence that petitioner alleged to be newly discovered was in fact not evidence (Pet. App. A-2). An examination of the allegations contained in petitioner's motion shows that they focused entirely on challenging the materiality and substantiality of the evidence and the credibility of the witnesses at trial (Pet. App. C-1 to C-20).

taking an appeal if no appeal is taken; if, as here, an appeal is taken, the two-year period runs from the date of issuance of the mandate of affirmance by the court of appeals. See, *e.g.*, *United States* v. *White*, 557 F. 2d 1249 (8th Cir.), cert. denied, 434 U.S. 870 (1977); *United States* v. *Granza*, 427 F. 2d 184 (5th Cir. 1970); *Smith* v. *United States*, 283 F. 2d 607 (D.C. Cir. 1960) (Bazelon, J., concurring); *United States* v. *Rojas*, 574 F. 2d 476 (9th Cir. 1978). Contrary to petitioner's argument (Pet. 5-7), the date of a final judgment for purposes of Rule 33 is the date the mandate issues and not the date of final sentence under 18 U.S.C. 4208(b).[2] *Casias* v. *United States*, 337 F. 2d 354 (10th Cir. 1964); *United States* v. *White*, *supra*. See 2 C. Wright, *Federal Practice and Procedure: Criminal* § 558 (1969).

Here, petitioner did not file his motion for a new trial until February 8, 1978, more than two years after the mandate of affirmance was entered on the docket of the district court on October 21, 1975 (Pet. App. A-4). The time for filing the motion could not be enlarged. Rule 45(b), Fed. R. Crim. P. Thus, petitioner's motion was not timely and could not be considered by the district court. *United States* v. *Smith*, 331 U.S. 469 (1947); *United States*

[2]*United States* v. *Behrens*, 375 U.S. 162 (1963), *Corey* v. *United States*, 375 U.S. 169 (1963), and *Berman* v. *United States*, 302 U.S. 211 (1937), upon which petitioner relies (Pet. 5-6), are distinguishable. The question presented in *Behrens* was whether the defendant and his attorney should be present at final sentencing under Rule 43, Fed. R. Crim. P. In *Corey*, the Court held that for purposes of the predecessor of Rule 4(b), Fed. R. App. P., when a defendant is sentenced under 18 U.S.C. 4205(c), the defendant may take an appeal "after either the first *or* the second sentence" (375 U.S. at 173; (emphasis in original). Here, petitioner took an appeal after the first sentence and the finality of that appeal is controlling. See 375 U.S. at 174. *Berman* is likewise inapposite. It involved the question whether an appeal was interlocutory.

v. *Beran*, 546 F. 2d 1316 (8th Cir. 1976), cert. denied, 430 U.S. 916 (1977).

2. In view of the palpable untimeliness of petitioner's new trial motion, which is established by uncontroverted docket entries, there is no need to consider the issue of the jurisdiction of the district court to vacate its order denying the motion. In any event, the decision below correctly held that the district court had no jurisdiction to vacate its order denying the motion for a new trial. Rule 26(b), Fed. R. App. P., provides that a court may not enlarge the time for filing a notice of appeal. It is well settled that the taking of an appeal within the time prescribed in Rule 4(b), Fed. R. App. P., is mandatory and jurisdictional. *United States* v. *Robinson*, 361 U.S. 220 (1960); *Berman* v. *United States*, 378 U.S. 530 (1964); *Browder* v. *Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978).

Petitioner urges (Pet. 7-11) that the decision below should have followed the rationale of cases in which, because the clerk had failed to give notice of entry of judgment as required by Rule 77(d), Fed. R. Civ. P., the courts vacated the judgment under Rule 60(b) of those rules. But whatever the rule may be with respect to civil cases, Rule 49(c) of the Federal Rules of Criminal Procedure explicitly provides that lack of notice of an entry of an order from the clerk does not affect the time to appeal or authorize the court to relieve a party for failure to appeal within the time allowed.[3]

[3]Compare *Hill* v. *Hawes*, 320 U.S. 520 (1944); *Rosenbloom* v. *United States*, 355 U.S. 80 (1957), *Carter* v. *United States*, 168 F. 2d 310 (10th Cir. 1948), and *Lohman* v. *United States*, 237 F. 2d 645 (6th Cir. 1956). Those decisions are no longer authoritative after the amendment of Rule 49(c) and the related amendment of Fed. R. Civ. P. *United States* v. *Stolarz*, 547 F. 2d 108, 110-111 n.2 (9th Cir. 1976), cert. denied, 434 U.S. 851 (1977). See also 3 C. Wright, *Federal Practice and Procedure: Criminal* § 823 (1969).

At all events, it is settled that the court's failure to notify a party, standing alone, is not sufficient to warrant relief under Rule 60(b). *E.g.*, *Kramer* v. *American Postal Workers Union, AFL-CIO*, 556 F. 2d 929 (9th Cir. 1977); *Mizell* v. *Attorney General of New York*, 586 F. 2d 942 (2d Cir. 1978). See 16 C. Wright, A. Miller, E. Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 3950 (1979 Supp.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE JR.
Solicitor General

SEPTEMBER 1979

DOJ-1979-09

In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-30

Ben Klein, *Petitioner*

v.

United States of America, *Respondent*

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ben Klein
Pro Se
1738 Pearl
Denver, CO 80203

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-30

Ben Klein, *Petitioner*

v.

United States of America, *Respondent*

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I.

1. Does the two year limitation period, required by Rule 33 of the Fed.R.Crim.P. for filling a Motion for a New Trial based on the ground of newly discovered evidence, run from a final sentence pursuant to 18 USC 4208(b), now 18 USC 4205(c).

In his memorandum in opposition to our Petition the Honorable Solicitor General doesn't deny or dispute the following pertinent facts as set forth in the Petition, and they are thus admitted.

(a) That the Petitioner was sentenced pursuant to 18 USC 4208(b), now 18 USC 4205(c).

(b) That the Court pursuant to 18 USC 4208(b) sentenced the Petitioner not once, but twice, the first being the maximum and the final sentence being probation on February 9, 1976.

(c) That the governments response in the trial court to Petitioner's Motion for a New Trial did not deny the allegations of said Motion for New Trial (Pet-4).

(d) That counsel for both sides knew nothing of Judge's order denying Motion for New Trial.

(e) That after an inquiry, the Clerk's Office in Denver was contacted by Judge Bratton, and as a result thereof copies of the order were mailed to all Counsel. Thus, both sides knew of the ruling on October 23, 1978 (Pet App D1-D3).

(f) That the Petitioner upon receipt of notice of said order by Judge Bratton immediately filed Notice of Appeal and Motion to Vacate.

None of the cases cited by the Solicitor General in his memorandum involve a sentence pursuant to 18 USC 4208(b) and he is undoubtedly correct for cases not involving the above cited statute.

It is obvious that the intent of Congress in enacting Section 4208(b) was twofold: (a) That the original order of commitment is wholly tentative and (b) upon receipt of the study the Judge pronounces a final sentence.

It thus becomes clear that for the purposes of a Motion for a New Trial based on the ground of newly discovered evidence the sentence pronounced upon receipt of the report from the Bureau of Prisons is the final judgment[1]. It is clear that this Court has ruled that the final sentence is pronounced after the report is received, otherwise why would it be necessary for the Defendant to be present[2]. A sentence pursuant to 18 USC 4208(b) is not an ordinary

[1]Rule 33, Fed.R.Crim.P. provides that "a motion for a new trial based upon the grounds of newly discovered evidence may be made only before or within two years after final judgment."

[2]U.S. v. Behrns, 375 US 162, 84 SupCt 295

criminal case since a convicted defendant is sentenced twice.[3]

THE DECISION IN THIS CASE (10th CIRCUIT) IS IN CONFLICT WITH FOUR OTHER CIRCUITS: (1) U.S. v. Duardi (514 F2d 545, 8th Circuit 1975), the defendants were sentenced pursuant to 18 USC 4208(b); they appealed their convictions which were affirmed. After the convictions were affirmed on appeal the trial court noted its receipt and evaluations and recommendations pursuant to Section 4208(b). The government filed notice pursuant to special offenders act. The Court dismissed said notice and the government appealed prior to defendant being sentenced. The court said at page 547:

> **"The parties agree and it is clear from the record that the trial judge has not yet entered the final sentences on the conspiracy convictions. Rather, under 18 USC 4208(b), he has merely placed the defendants in the custody of the Attorney General for study and recommendation. By the very terms of that statute he may now place the defendants on probation, affirm the term of sentence originally imposed or reduce that sentence. It is, therefore, clear that there has been no "final judgment," as that term is defined in criminal cases, and that an appeal will not lie at this time under 28 USC 1291."**

The Duradi case is on all fours with the Petitioner's.

(2) Walsh v. US, 374 F2d 421 (1967, 9th Circuit) holds that the original commitment under 18 USC 4208(b) is only tentative and that the sentence imposed upon receipt of the final report is the final judgment.

[3]Corey v. US, 375 US 169, 84 SupCt 298

(3) See also U.S. v. Jerry James, 459 F2d 443, (1972, 5th Circuit), and (4) Farries v. U.S., 439 F2d 781 (3rd Circuit) and Bolduc v. U.S., 363 F2d 832 (1966, 5th Circuit).

The Solicitor on Page 4 of his brief cites U.S. v. Smith, 331 US 469 (not on point, where the court on its own motion granted a new trial) and U.S. v. Beran, 546 F2d 1316 (motion for new trial granted more than 7 days after verdict), both not in point.

Rule 32, Fed.R.Crim.P. provides among other things:
(b) Judgment.

> **(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence.**
>
> > **(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 USC 4208(b), 4252, 5010(e), or 5034 shall be considered.**

Particularly pertinent here is the oft-enunciated principle that in criminal cases final judgment means sentence. "The sentence is the judgment." Parr v. United States, 351 US 513, 518, 76 S.Ct.912, 100 L.Ed. 1377 (1956); Berman v. United States, 302 US 211, 212, 58 S.Ct. 164, 82 L.Ed 204 (1937); United States v. Wilson, 440 F.2d 1103, 1104 (5th Cir.), cert. denied, 404 US 882, 92 S.Ct. 210, 30 L.Ed.2d 163 (1971).

If we follow the Solicitor's argument, final sentence under section 4208(b) is not final at all.

In Corey Supra this Honorable Court states as follows:

"At page 302 in footnote 15 in the court opinion.

"Only the final sentence which was later imposed would still have been open, under accepted procedures, to attack in the trial court and review on appeal".

So it is absolutely clear that the Petitioner's final sentence pursuant to Section 4208(b) on February 9, 1976, was a final judgment for the purposes of Rule 33 and would have still been open to review on appeal. Thus the motion for new trial for newly discovered evidence having been filed on February 8, 1978, was timely.

II.

We also urged in our Petition as follows:

> "2. Where petitioner did not appeal to the Circuit Court within the ten days allowed by Federal Rules of Appellate Procedure 4(b) because the clerk failed to notify the petitioner and respondent of the Court's order denying defendant's Motion for New Trial pursuant to Rule 49(c) Fed.R.Crim.P.; and where both parties were notified by the Clerk six and one half months later at the request of the trial judge, may the appeal be perfected either by filing Notice of Appeal within 10 days after receiving actual notice of judgment from the clerk, or in the alternative shall the Court vacate the judgment and enter a new judgment of which notice may be sent and from which appeal may be taken."

Frankly, we were shocked by the Solicitor General's cavalier treatment of the cases he discussed in footnote 3 on page 4 of his memorandum, to-wit: Hill v. Hawes, 320 US 520 (1944) and Rosenbloom vs. US, 355 US 80 (1957) claiming they are no longer in point.

He brushes over the fact that this Honorable Court's own advisory committee comprised of distinguished lawyers in approving the amendment to Rule 49(c) Fed.R. Crim.P. continued to allow the following comment made

by the advisory committee as its interpretation of the amended rule:

> **"but in a case in which the losing party in reliance on the clerk's obligation to send a notice failed to file a timely notice of appeal, it was held competent for the trial judge, in the exercise of sound discretion, to vacate the judgment because of the clerk's failure to give notice and to enter a new judgment, the term of court not having expired. Hill v. Hawes, 64 S.Ct. 334, 320 US 520, 88 L.Ed 283, rehearing denied 64 S.Ct. 515, 321 US 801, 88 L.Ed.1088."**

It is then clear that this Court expressed its intent by adopting said amendment together with the advisory committee's notes.

The Solicitor cites no cases where both parties (as was the case here) had no notice of the trial court's ruling.

The trial court found that the facts in this case arose from an unusual set of circumstances and further stated "there is much to commend this position especially in a case such as the present one." (Pet App D1, D3).

Professor Moore would agree with our position, Moore's Federal Practice, 99 204.4, 204.16.

In this case there was no prejudice to the government and under these circumstances the purpose of justice would not be served by not allowing this appeal.

The citations on Page 11 of our Petition indicate that there has grown up a line of cases in at least four circuits that under circumstances such as ours an appeal has been allowed. We urge these once again.

Apparently the Solicitor concedes that the rule has been applied differently in civil cases.

In Rodriguez v. US, 395 US 327, 89 SCt 1715, 23 LEd 24 340 (1969), at page 1717, Mr. Justice Marshall said,

"As this Court has noted before present federal law has made an appeal from a District Courts' judgment of conviction in a criminal case what is in effect a matter of right."

Here the record shows that the trial judge erroneously failed to advise Petitioner of right to appeal, Fed.R.Crim. P. 37a(2) when he was sentenced under section 4208(b) on February 9, 1976.

Mandatory time limit for Perfecting an appeal doesn't begin to run until defendant is actually notified of his rights. See Farries vs. US, 439 F2d 781 (3rd Circuit, 1971) (Involves a final sentence under section 4208(b), Court found such a sentence was appealable and remanded for vacation so the defendant could file a timely appeal because when he was sentenced under section 4208(b) he wasn't advised of his right of appeal as is the case here.)

Here Petitioner was worse off then civil litigant. Moreover, even appeals not timely has been held sufficient dealing with excusable neglect. See Wolfsohn vs. Hunken, 376 US 203, 84 SCt 699, 11 LEd 2nd 636; Thompson vs Immigration and Naturalization Service, 375 US 384, 84 SCt 397, 11 LEd 29 404; Harris Truck Lines vs. Cherry Meat Packers, Inc., 371 US 215, 83 SupCt 283, 9 LEd 2d 261. Surely the rule in criminal cases should not be more strictly applied. Even more odd is the fact that Petitioner because he had a lawyer is worse off than a defendant who does not have a lawyer.

CONCLUSION

We wouldn't have commented on the merits of the Motion for New Trial but except for the fact of the Solicitor's comment in footnotes 1 and on page 2 of his memorandum where he claims the Motion for New Trial has no merit.

He wants to deny our right to litigate the merits in the circuit, and he attempts to do so in this Court without citation to code or case.

It should also be noted that the Circuit in ruling that a final sentence under section 4208(b) is not a final judgment under Rule 33, thereby ruled on a portion of the trial courts order without actually granting an appeal and without allowing us to argue the point in the Circuit by briefs.

In one breath the Circuit said your appeal is untimely but without giving us the right to argue an appeal ruled on one of our points without our argument but made no comment on the merits of the Motion for New Trial.

Here as we pointed out in our Petition the government in their response to our Motion for New Trial admitted and the Solicitor doesn't quarrel with this:

(a) That this was a case of selective prosecution.

(b) Admitted that the government told the impartial Court-appointed psychiatrist that the Petitioner was a narcotics peddler and had not reported his income therefrom, (all of which was untrue), while the other psychiatrists who were not employed by the government or court-appointed were not given this information thus prejudicing the Petitioner at the trial.

(c) That the Internal Revenue Service in all of their documents which they did not release to Petitioner claimed that the likely source in the net worth tax case was illegal income from narcotics which was untrue, while claiming something else at the trial.

(d) That the Petitioner was made a special target because of his politics by the Bureau of Narcotics and Dangerous Drugs, the Secretary of the Treasury and the Internal Revenue Service.

(e) That the government had in their possession, prior to trial, exculpatory evidence favorable to the defendant but denied Petitioner access to it even upon his request.

(f) The government did not deny that this was newly discovered subsequent to trial.

(g) The government admitted in their response that the Petitioner was under scrutiny as the target of a narcotics investigation and that this involvement led to his indictment.

The grand jury was told that the Petitioner's likely source in net worth income tax was illegal narcotics. This was not the thrust of the government's case during the trial; which would have been expulcatory had Petitioner known this. In other words, the grand jury was told one thing and the thrust of the trial was entirely different. In fact the truth is that Petitioner was never at any time involved in narcotics.

All of these matters were entitled to be heard on the merits.

For the reasons stated, it is respectfully requested that this Court grant a Writ of Certiorari and reverse the judgment of the 10th Circuit summarily and order the trial court to hear arguments on the Motion for New Trial or in the alternative, calendar the case for argument on the merits.

Respectfully submitted,

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